The judicial entrenchment of constitutionalism in Africa: A comparative overview of the positive development in the Kenyan and South African jurisdictions

Mbuzeni Mathenjwa*

Professor of Law, Department of Public, Constitutional and International Law, College of Law, University of South Africa, South Africa

Abstract

Similarly, to most of their counterparts in Africa, South Africa and Kenya have a history of disrespecting constitutionalism by flouting their constitutions. This occurs despite the good intentions to preserve judicial independence, the rule of law, democracy and constitutionalism displayed by these countries by enshrining these values in their constitutions. The guarantee of judicial independence by the constitution is essential for an impartial judge to preside without bias or favor over matters that involve the violation of the constitution by the executive, the legislature and even the judiciary itself. It is the enshrining of the independence of the judiciary that enables the Kenyan and South African courts respectively to deliver judgements that have declared unconstitutional and invalid the election of a sitting president during a presidential election in Kenya, declaring the conduct of the president and the legislature unconstitutional and invalid in South Africa and forcing these institutions to comply with the constitution. While both Kenya and South Africa can learn from each other with respect to the preservation of constitutionalism, it is more important that the democracies in the world should learn from these democracies which have taken giant steps in protecting judicial independence and, ultimately, preserving constitutionalism.

1. Introduction

The phrase "judicial entrenchment" may raise questions in academic literature relative to what is entrenched, against whom and by what means.[1] The constitution uses language that creates positive obligations and places certain limitations that should be respected. The government and citizens are required to uphold the constitution, and, when they fail to do so, the judiciary becomes a vital device to monitor adherence to the spirit of the constitution. The courts fortify respect for the constitution when they enforce compliance with the provisions of the constitution. In this regard the judiciary forces organs of state to make credible commitment that they will respect limitations and fulfill obligations imposed by the constitution. Entrenchment is not necessary when the commitment is fulfilled but it offers the best solution when there is any failure to fulfil the commitment.[2] Judicial entrenchment of constitutionalism entails the reinforcement of constitutionalism through court judgements. This occurs when courts order compliance with the constitution and the executive, legislature and citizens respect and comply with the court orders. Constitutionalism is entrenched when compliance with the provisions of the constitution that is binding against subsequent executive and legislative actions is enforced.

Africa is primarily perceived by Western countries as being a dark continent which has little regard for human rights, the rule of law or constitutionalism.[3] Given this background, most African countries sent a positive message that African countries would preserve constitutionalism by incorporating constitutional democracy as one of the core founding values in their post-colonial independence constitutions. Such positive intentions and aims are, however, negated by the conduct of African leaders who, despite the adoption

*paper delivered by Professor Mbuzeni Mathenjwa at the conference of the Network of African Constitutional Lawyers in Botswana on 11-13 October 2018.

[1] Posner EA & Vermeule A " Legislative entrenchment: A reappraisal" (2002) 111 *Yale Law Journal* 1665 at 1666.

[2] Gilbert MD " The law and economics of entrenchment" (2019) 54 *Georgia Law Review* 1 at 1.

[3] See *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para1.

of constitutions that promise democracy, the rule of law, constitutionalism, accountability and transparency, acquire absolute power and establish dictatorships.[4]

Despite setbacks with regard to the preservation of constitutionalism by the legislature and the executive, the judiciary in some African countries has delivered judgments that have the potential of preserving constitutionalism. The recent judgments of the Supreme Court of Kenya, and the Supreme Court of Appeal and the Constitutional Court of South Africa against the executive, Parliament and the Independent Electoral Commission revive hopes of the preservation of constitutionalism on the continent.

This article discusses the development with regard to preserving constitutionalism through the judgments of the courts in the Kenyan and South African jurisdictions. The choice of these jurisdictions for comparison is informed by the similarities in providing for constitutional supremacy and judicial independence in the constitutions of both countries that enhances the role of the courts in deciding cases before them without fear or favour.[5]

The cases analysed are ground breaking cases in promoting constitutionalism in these countries. Kenyan electoral jurisprudence, where courts have decided on the validity of the presidential election of the sitting president to the position of the country's president, has received wide international attention, whereas South African courts decisions on the legislature's oversight on the president are topical issues in the continent. The recent Kenyan court decision that annulled the presidential election of Kenya and the recent judgements by the court which invalidated decisions of the president and Parliament in South Africa suggest a need for comparative research on the promotion of constitutionalism by the judiciary in these two democracies. In setting a pace for the

[4] Olasunkanmi A "Constitutionalism and the challenge of development in Africa" (2014) 5 *International Journal of Politics and Governance* 1 at 2-3 points out that immediately after independence, the post-colonial African leaders are visibly and notoriously oppressive, and they have acquired absolute power which makes it possible for them to ensure that the people adjust to the structure of oppression and exploitation.

[5] Article 2 (1) of the constitution of Kenya of 2010 provides that the constitution of Kenya is the supreme law and binds all persons and all state organs at both levels of government; art 160 provides that in the exercise of judicial authority, the judiciary shall be subject only to the constitution and the law and shall not be subject to control or direction of any person or authority. Section 2 of the constitution of the Republic of South Africa, 1996 provides that the constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled; section 165 (2) provides that the courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice.

discussion, the notions of constitutionalism and judicial independence are explained. In discussing the notion of judicial independence, the constitutional framework for judicial independence in both countries is explored. Selected court decisions on presidential elections in Kenya, the legislature's oversight of the president in South Africa is discussed. The rationale for this discussion is to demonstrate how the judiciary has, through court rulings, enforced compliance with constitutional obligations and limitations placed on the executive and parliament in exercising their public powers. Finally, a conclusion is drawn about the effect of the South African and Kenyan jurisdictions in promoting constitutionalism on the continent.

2. The notion of constitutionalism

Literally, constitutionalism relates to governance in accordance with the constitution. The constitution is an essential element of constitutionalism. It is a charter of the state that sketches the nature and mode of government, including the classification, elections and terms of office of government officials, the division of government authority and the rights of citizens.[6] The constitution is the fundamental law that deals with the creation, distribution, and exercise of state power.[7] Constitutionalism could be explained from the positivist and neo-liberal theories. The positivists see the constitution as a source of positive obligation.[8] It is an instrument of empowerment that creates positive benefits such as equal opportunity.[9] Dobner points out that, in a constitutional democracy, the constitution should guarantee democratic government in that it does not only limit the government's exercise of power but also legitimises such exercise of power.[10] This notion

---

6 Greenberg D Katz SM, Oliviero MB & Wheatley S(eds) *Constitutionalism and democracy*: *Transitions in the contemporary world* Oxford: Oxford University Press (1993) at 8.

7 Okoth-Ogendo HWO "Constitutions without constitutionalism: A reflections on an African political paradox" in Greenberg D, Katz SN , Oliviero B & Wheatly S (eds) *Constitutionalism and democracy*: *Transition in the contemporary world* (1993) 67.

8 Gerstenberg O " Negetive/Positive constitutionalism, ' Fair balance,' and the problem of justiciability" (2012) 10 *International Journal of Constitutional Law* 904 at 906.

9 Barber A " Constitutionalism in exile: Is the constitution a charter of negative liberties or a charter of positive benefits?: Fallacies of negative constitutionalism (2006) 75 *Fordham Law Review* 651 at 660.

10 Dobner P " More law, less democracy?: Democracy and transitional constitutionalism" in Dobner P & Loughlin M(eds) *The twilight of constitutionalism* Oxford: Oxford University Press (2010) 143.

of constitutionalism, then, entails that a constitution should be a source of positive obligation.

The neo-liberal theorists see the limiting of government power as the chief object of constitutionalism. In reinforcing this view Okoth-Ogendo argues that there could be no constitutional government unless such mechanisms exist within the constitution itself for the supervision and limitation of government functions.[11] This view is substantiated by Rosenfeld who points out that the essential elements of modern constitutionalism are the limitation of governmental power, adherence to the rule of law and the protection of fundamental rights.[12]

Despite different theories on constitutionalism, constitutionalism is grounded on the notion of keeping government focused on its respect for the constitution and the political will by political actors in government to fulfil constitutional obligations and abide by the limitations on the exercise of powers provided for in the constitution itself. First and foremost, political actors in government should exercise their powers within the confines of the constitution. The respect for the constitution is facilitated by the nature of a democratic constitution that contains a set of norms upon which a nation's diverse people have agreed and which is applicable to all important matters of the people.[13] Accordingly, constitutionalism does not entail governance in accordance with a constitution only but also that it is in accordance with the constitution that has the support of, and represents the aspirations of, the people.[14]

3. The notion of judicial independence

[11] Okoth-Ogendo (1993) at 66.

[12] Rosenfeld M "The rule of law and the legitimacy of constitutional democracy " (2001) 74 *Southern California Law Review* 1307 at 1307.

[13] Dobner (2010) at 143.

[14] Ramcharan BG " Constitutionalism in an age of globalisation and global threats" in Frishman M & Muller S (eds) *The dynamics of constitutionalism in the age of globalisation* The Netherlands: Hague Academic Press (2008) 20.

The notion of judicial independence refers firstly to individual or personal independence that requires judges to interpret and enforce the law impartially and without bias.[15] Impartiality requires a judge to approach a specific case without taking into account his or her own personal views, ideological commitments or party political beliefs.[16] It is, however, debatable whether judges can ignore their personal views on political and social matters completely when interpreting provisions of the constitution. The Constitutional Court of South Africa has confirmed, in various judgments, that judges should not be influenced by any belief or outside interference when deciding cases before them.[17] Secondly, the notion of judicial independence refers to institutional independence that pertains to structural safeguards that must be put in place to ensure that judges are protected from the influence of, and interference by, other branches of government.[18] Judges may not be impartial if the judiciary is not created to be independent from other branches of government and the conditions under which the judiciary functions are not conducive to the independent exercise of judicial authority. The personality and skills of individual judges play a huge role on the independence of the judiciary. Judicial independence demands a high level of integrity and skills from judges. Judges must be grounded on integrity and possess a high level of competence, because any appearance of impropriety would impact on public confidence in the judiciary and negate the preservation of the independence of the judiciary.[19] Basically the principle of judicial independence ought to protect judges from interference from governmental, business or

---

[15] De Vos P & Freedman W (eds) *South African Constitutional Law in Context* South Africa: Oxford University Press (2010) at 225.

[16] De Vos & Freedman (2010) at 226.

[17] In *President of the Republic of South Africa v South African Rugby Football Union* 1999 7 BCLR 725 at para 48 the Constitutional Court warned that individual judges should disabuse their minds of any predispositions when presiding over cases; in *S v Van Rooyen (General Council of the Bar of South Africa Intervening)* 2002 8 BCLR 810at para 19 the Constitutional Court affirmed that the essence of judicial independence is the complete liberty of individual judges to hear and decide cases before them without any interference by any outsider, pressure groups or even another judge.

[18] Siyo L & Mubangazi JC " The independence of South African judges: A constitutional and legislative perspective (2015) 18 *PER* 817 at 818.

[19] Moliterno JE "The administrative judiciary's independence myth" (2006) *Journal of the national Association of Administrative Law Judiciary* 53 at 56.

other social pressures includes: the appointment of judges by an independent institution; security of tenure that ensures that judges will not be dismissed or face the threat of dismissal from office for making a decision adverse to the interests of the government; financial security that protects judges from a threat of reducing their salaries and other benefits for making an unpopular decision; and the limitation of civil liability that guarantees that judges, in the carrying out of their functions, will not incur civil liability for what they say or do.[20] The mere proclamation of judicial independence, however, does not make judges impartial. Unwavering commitment to the oath of office and the disposition of a high level of competence by judges would reinforce the preservation of judicial independence.

4. Judicial independence in Kenya

4. 1 The judiciary under the 1963 constitution

In 1963, prior to its independence from Britain, Kenya negotiated and adopted its first independence constitution.[21] The constitution did not make provision for the supremacy of the constitution nor the protection of the rule of law and the independence of the judiciary. The effect of the lack of the recognition of the independence of the judiciary in the constitution was manifest in the attitude of the executive which restricted the discretion of the judiciary in various ways. The relationship between the judiciary and the executive in Kenya was characterised by attitudes of outright contempt and disobedience with regard to the processes and decisions of the courts by factions of the executive and the legislature.[22] This view is reinforced by Ojwang J who states that, in the pre- 2010 constitutional dispensation in Kenya, the government had an attitude with regard to the judiciary that was clearly unfavourable to judicial independence.[23] Oseko substantiates

---

[20] Ojwang B "The independence of the judiciary in Kenya" (2008-2010) 2 *Kenya Law Review* 1 at 6 explains that to protect the principle of judicial independence from compromises emanating from the executive progressive countries democracies have adopted certain safeguards that include the mode of appointment of judges, providing for tenure for the judge, collective concurrence on a candidate for appointment as a judge, commitment to the governing ethos of judicial independence and absolute care in the regulation of terms of service and promotion for judges.

[21] See constitution of the Republic of Kenya of 1963.

[22] Mr Justice Gicheru JE "Independence of the judiciary: Accountability and contempt of court (2007) 1 *Kenya Law Review* 1 at 1.

[23] Ojwang (2008-2010) at 10.

this view when he argues that the legislative power was vested in the legislature, executive power in the president, but judicial power was not similarly vested in the judiciary in the pre- 2010 constitutional dispensation.[24] Oseko drew the conclusion that the omission of the specific powers of the judiciary contributed to the perception that the judiciary was an appendage of the executive.[25] It is widely reported that, many years after independence, the executive in Kenya continued to interfere directly in cases before the courts. In this regard, Oseko refers to instances where former President Moi was reported to have warned the judiciary to refrain from involvement in political party matters and to have further instructed the Chief Justice not to hear disputes against political parties.[26]

For these reasons, Pfeiffer draws the conclusion that the 1963 independence constitution gave more control to the president over the appointment and removal of judges.[27]

Despite these negative perceptions about the independence of the judiciary, Kenyans trusted the courts on a number of occasions to adjudicate on presidential election disputes. In the judgment of *Moi v Matiba*,[28] the applicant, one of the presidential candidates in the general elections held on 29 December 1992, filed a petition in court challenging the election of Mr Moi as the president-elect. In the proceedings before the electoral court the respondent - Mr Moi - raised a preliminary point that the matter should be struck off because the petition had not been signed by the petitioner. The electoral laws required that a petition filed in court against the election of the president must be signed by all the petitioners.[29] Although the petition had not been signed by the applicant, it had been signed by his wife who was exercising a power of attorney granted to her by the applicant. The applicant had used the same signature in accepting his nomination to

---

[24] Oseko OJ "Judicial independence in Kenya: Constitutional challenges and opportunities for reform" (unpublished D Phil thesis Leicester University, United Kingdom 2011) at 132. Section 30 of the constitution of Kenya Amendment Act of 2008 vested the legislative power in parliament, section 23 vested the executive power to the president and there was no express mentioning of the vesting of power to the judiciary. Similarly to the independence constitution of 1963, the Constitution Amendment Act was silent on the issue of independence of the judiciary.

[25] Oseko (2011)at 132.

[26] Oseko (2011) at 180.

[27] Pfeifer SB " The Role of the judiciary in the constitutional systems of East Africa (1978) 16 *The Journal of Modern African Studies* 33 at 47.

[28] See *Moi v Matiba and 2 others* (2008) 1 KLR.

[29] Rule 4 (3) of the National Assembly Elections, 1993 provides that a petition challenging the election of the president-elect shall be signed by all the petitioners.

contest presidential elections. The Electoral Court found that the signature by the wife of the applicant on a power of attorney which had been previously accepted by the Electoral Commission constituted a signature of the petitioner and was acceptable. On appeal by respondent to the Supreme Court, the Court found that rule 4 (3) of the National Assembly Elections did not allow the petition to be signed by anyone other than the petitioner himself/herself. Consequently, the petition was struck off. The challenge to the validity of the presidential election was dismissed on a technicality based on the interpretation of electoral laws. The irony of this decision is that, since the applicant was allowed to contest the election by authorising his wife by a power of attorney to sign the nomination on his behalf, arguably the same form of signature could have been accepted for challenging the election results.

In another presidential election dispute judgement of *Orengo v Moi,*[30] the petitioner challenged the election of Mr Moi to the office of president on a different ground than that in the *Moi v Matimba* judgment.[31] In 1992, before Mr Moi was elected as the president for the third term, the constitution had been amended and limited the term of office that a person could serve as president to two terms with each term lasting for five years.[32] At the time the amendment was introduced Mr Moi had already served two terms. In dismissing the petition, the court held that the amendment did not operate retrospectively. Consequently, the two terms that Mr Moi had served prior to the coming into effect of the amendment were not affected by the amendment. This judgment could be criticised for not having considered the object of placing a limitation on presidential terms of office. Some of the rationale, among other things, for limiting the terms of public representatives in government is to avoid an inherent danger that a person could commit errors when kept in office for a long passage of time.[33] By limiting the term of office the mistakes

[30] See *Orengo v Moi and 12 Others* [2008] 1 KLR .

[31] See *Moi v Matimba and 2 others* (2008) 1 KLR.

[32] Section 9 (2) of the constitution of Kenya Amendment Act 6 of 1992 provided that no person shall be elected to hold office of president for more than two terms.

[33] Epstein RA " Why we need term limits for congress: Four senate, ten in the house" (2010) 78 *Tennesse Law Review* 849 at 856.

committed by the representative could be corrected, but it is harder to take corrective steps against a president who enjoys an indefinite term of office.[34]

The controversy surrounding presidential elections in Kenya cropped up again In *Mwai kibaki v Daniel Moi*.[35] Once again the validity of the election of the president-elect - Mr Moi - after the general elections of the 29 December 1997 was challenged in court. The electoral laws required a petition challenging the validity of an election to be served on the respondent within 28 days from the date of publication of the result of the elections.[36] The applicant had published a notice of filing the petition challenging the results of the presidential election. The respondent asked for an order to strike off the petition based on the ground that it had not been served on him. Subsequently, the Supreme Court struck off the petition based on the grounds that it had not been served on the respondent. It should be recognised that, although the president was not personally served with notice of the petition, such a notice had been published in the Government Gazette. Arguably, the respondent was the sitting president and, as the first citizen of the country, he ought to have known about the notice of the petition that had been published in the gazette. The court avoided hearing the petition on its merits and dismissed it on a technicality.

4. 2 The judiciary under the 2010 constitution

On 6 May 2010, Kenya adopted its new constitution.[37] This constitution vests judicial authority in the courts and tribunals.[38] The exercise of judicial authority is subject only to the constitution and the law and not to the control or direction of any person or authority.[39] Judges are protected from threats to reduce their salaries in that the remuneration and benefits payable to a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired

---

[34] Epstein (2010) at 856.

[35] See *Mwai Kibaki v Daniel Moi* [1999] eKLR.

[36] Section (20) (1) of the National Assembly Election (Cap 7) provides that a petition to question the validity of an election shall be presented and served within 28 days after the date of publication of the results of the election in the Government Gazette.

[37] See constitution of Kenya, 2010.

[38] See article 159 (1) of the constitution of Kenya of 2010.

[39] See article 160 (1) of the constitution.

judge.[40] The constitution establishes the Judicial Service Commission (JSC) that is mandated to promote and facilitate the independence of the judiciary.[41] The JSC plays an important role in the appointment of judges to safeguard the independence of the judiciary. The president appoints the Chief Justice and the Deputy Chief Justice on the recommendation of the JSC, subject to the approval of the National Assembly,[42] and all other judges are appointed in accordance with the recommendations of the JSC.[43] Though the requirement of approval by the National Assembly gives the ruling party a disproportionate say on the appointment of the Chief Justice and Deputy Chief Justice, it is a vital check and balance with regard to the exercise of the president's powers.

All judges shall retire from office upon attaining the age of 70 years, but they may elect to retire at any time after attaining the age of 65 years,[44] and the Chief Justice cannot hold office for more than 10 years.[45] A judge can be removed from office on the grounds of mental or physical infirmities, breach of the code of conduct prescribed for judges of superior courts by Act of Parliament, bankruptcy, incompetence or gross misconduct or misbehaviour.[46] The removal of a judge may be initiated only by the JSC.[47] In removing a judge from office the president must act in accordance with recommendations of the JSC.[48]

The composition of, and the appointment of, members of the JSC are crucial for the preservation of judicial independence. The Commission consists of the Chief Justice, who is the chairperson of the Commission, one Supreme Court judge elected by judges of the Supreme Court, one Court of Appeal judge elected by judges of the Appeal Court, one High Court judge, and one male and one female judge elected by the society of judges and magistrates, the Attorney-General, one female and one male advocate elected by the professional body of advocates, one person nominated by the Public

[40] See article 160 (4) of the constitution.
[41] See article 172 of the constitution.
[42] See article 166 (1) (a) of the constitution.
[43] See article 166 (1) (b) of the constitution.
[44] See article 167 of the constitution.
[45] See article 167 (2) of the constitution.
[46] See article 168 (1) (a)-(c) of the constitution.
[47] See article 168 (2) of the constitution.
[48] See article 168 (8) of the Constitution.

Service Commission, and one female and one male person who are not lawyers and are appointed by the president with the approval of the National Assembly to represent the public.[49]

As pointed out above, the constitution that was adopted by Kenyans after independence did not make any provision for judicial independence.[50] The 2010 constitution of Kenya, therefore, marked a remarkable breakaway from the previous constitutions by making provision for the protection of judicial independence. The composition and appointment of members of the JSC leaves little room for the manipulation of the JSC by the executive. The executive, through the president, appoints only two of the ten members of the JSC. Furthermore, the appointment of the Chief Justice by the president on the recommendation of the JSC is likely to strengthen the independence of the court. Future chief justices would not need favours from the executive as they would be identified and recommended by the JSC. Oseko supports this view when he states that the requirements for the vetting of the aspirant Chief Justice and Deputy Chief Justice by members of the National Assembly bring greatly needed checks on the executive power with regard to making appointments.[51] This view, with regard to the appointment of judges, is reinforced by Mtunga who argues that the appointment process of judges is designed to give the judges independence from both the executive and the legislature so that judges can force other institutions of governance to do what they are supposed to do.[52]

4. 3 Positive development on the independence of the judiciary under the 2010 constitution of Kenya.

[49] See article 171 (2) (a)-(g) of the constitution.

[50] Section 171 of the constitution of Kenya of 1963 established the Supreme Court of Kenya and section 178 entrusted parliament with the power to establish other courts that were subordinate to the Supreme Court. The constitution was silent on the independence of the judiciary.

[51] Oseko (2011) at 232.

[52] Mtunga W "The 2010 constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions" (2015) 1 *Speculum Juris* 1 at 9.

The incorporation of the independence of the judiciary into the 2010 constitution reflects a positive step towards the protection of judicial independence in Kenya. Kenyans continued to show confidence in the judiciary by entrusting it with the task of resolving electoral disputes. The case of *Rail Odinga v The Independent Electoral and Boundaries Commission,*[53] marked the first judgement where the validity of the election of the president-elect was challenged after Kenya had held its first election, on 4 March 2013, after the promulgation of the new constitution. After Mr Kenyatta had been declared the president-elect, petitioners, including Mr Odinga (one of the candidates who had contested the presidential elections) challenged the election of Mr Kenyatta to the position of president. The challenge was based on the grounds, amongst other things, that the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results were lawful or not. The petitioners alleged that the candidate's agents were excluded from the national tallying centre, there were variations in the numbers of registered voters, and there were many irregularities in the data capturing and information capturing. With regard to the candidate's agents, the court found that the agents had become rowdy and quarrelsome. As a result, the decision of the Electoral Commission to remove them from the national tallying centre and relocate them to another room was justified.[54] Although there were variations in the number of registered votes, the court found that there were not major anomalies between the total number of registered voters and the total tally in the declaration of the presidential election results.[55] It was further found that, although there were many irregularities in the data and information capturing during the registration process, these were not substantial enough to affect the credibility of the electoral process, and the petition was consequently dismissed.[56]

---

[53] See *Rail Amolo Odinga v Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR.

[54] See *Rail Amolo Odinga v Independent Electoral and Boundaries Commission and 3 Others* at para 245.

[55] See *Rail Amolo Odinga v Independent Electoral and Boundaries Commission and 3 Others* at para 256.

[56] See *Rail Amolo Odinga v Independent Electoral and Boundaries Commission and 3 Others* at para 307.

It should be recognised that, in this judgment, the court found that there were irregularities in the election, but such irregularities did not negate the 'freeness' and the 'fairness' of the election. The difference between the electoral jurisprudence prior to 2010 and since the passing of the 2010 constitution is that, prior to the 2010 constitutional dispensation, the courts did not decide the substance of the presidential disputes. The petitions were merely dismissed on technicalities. In the post-2010 constitutional dispensation, the court for the first time considered and pronounced on the substance of presidential election.

The outcome of the presidential elections of 2017 was further challenged in the Supreme Court in the recently decided case of *Raila Amolo Odinga V Independent Electoral and Boundaries Commission*.[57] The issue arose from the presidential election held in Kenya on 8 August 2017. After the Independent Electoral and Boundaries Commission (IEBC) had announced that Mr Kenyatta, the sitting president of Kenya, had won the elections, his main challenger, Mr Odinga filed a petition challenging the declared results of the presidential election. The court held that the IEBC was obliged, under the constitution, to ensure that the voting system used had been accurate, verifiable, secure, accountable and transparent, and that appropriate structures and mechanisms to eliminate electoral materials were put in place, including the safekeeping of election materials.[58] The court found that, in the presidential election of 8 August 2017, the provisions of the constitution and the Elections Act[59] had been violated in that, at the time that the IEBC declared the final results, not all the results had been electronically and simultaneously transmitted from the polling stations to the national tallying centres and that the failure by the IEBC to verify the results before declaring them had violated the constitution.[60] Furthermore, there were numerous discrepancies between the results declared from various polling stations across the country.[61] Consequently, the court issued an order declaring that the

[57] See *Presidential Petition* 1 of 2017.
[58] See *Rail Amolo Odinga v Independent Electoral and Boundaries Commission and 3 others* at para 212.
[59] See Elections Act 24 of 2011.
[60] *Raila Amolo Odinga v Independent Electoral and Boundaries Commission and 3 others* at para 289.
[61] *Raila Amolo Odinga v Independent Electoral and Boundaries Commission and 3 others* at paras 375-377.

presidential election held on 8 August 2017 had not been conducted in accordance with the constitution and the applicable law and that this rendered the declared result invalid, null and void. It also ordered that the IEBC should re-organise and conduct a fresh election in strict conformity with the constitution and the applicable election laws within 60 days of the issuing of the judgement.

This decision has been hailed as reflecting a strong and independent judiciary as the cornerstone of democracy in Kenya.[62] The judgment was hailed as providing key lessons on how an independent judicial system functions, and there were calls on other democracies in the African continent to emulate Kenya in the matter of judicial independence. The judgement of the court demonstrates that the positive effort by Kenyans to safeguard judicial independence in their constitutions has come to fruition. The safeguard imposed on the appointment and composition of the JSC, the appointment of judges, and more particularly the Chief Justice who can be appointed only on recommendations by the JSC and approval by Parliament, provides that check and balance on the president's power to appoint the judges.

The re-run election was held in Kenya on 26 October 2017. Opposition parties boycotted the election, citing irregularities that would render the fresh election not free and fair.[63] Consequently, Mr Kenyatta contested and won the presidential election unopposed. Dissatisfied with the election of Mr Kenyatta, the petitioners launched a court application for an order setting aside such an election in the case of *JH Mwau v Independent Electoral and Boundaries Commission and 2 Others*.[64] The petitioners contended that the election had not been free from violence, intimidation, and corruption. They argued that, upon the nullification of the previous presidential election all documents, including the nomination of candidates and the issuance of nomination certificates used in the August election should not have been saved and should not have been used in the re-run election.[65] The

---

62 Walusansa W " Emulate Kenya Judicial Independence" (8-09-2017) *Daily Monitor* https:// www.monitor.co.ug/OpEd/Letters?Emulate-Kenya-judicial-independence/8060313 (accessed 13 September 2018).

63 Sieff K " Kenya election re-run marred by clashes and low turnout at the polls" *The Washington Post* (26- 10- 2017).

64 See *J H Mwau v Independent Electoral and Boundaries Commission and 2 Others* [2017] eKLR.

65 See *JH Mwau v Independent Electoral and Boundaries Commission* at para 9.

Supreme Court notwithstanding certain anomalies in the election process, the election met the threshold of credibility and legitimacy under the constitution.[66] The petition was dismissed, and the election of Mr Kenyatta as the country's president was upheld.[67]

As pointed out above, unlike the situation in the pre-2010 dispensation where courts avoided to consider the merits and dismissed the presidential elections disputes on technical grounds, in the post 2010 constitution era the courts considered and deliberated on the substance of the presidential disputes. The attitude of the courts is likely to strengthen the confidence of the people in the judiciary. The fearless attitude of the judges in deciding on presidential election disputes is bolstered by the enshrining of the independence of the judiciary in the constitution. For this reason, Mutunga praised the people of Kenya for choosing to place their faith in the institution of the judiciary in implementing the new constitution by providing for the institutional and decisional independence of the judiciary.[68]

Certainly, Kenya should be emulated as far as safeguarding judicial independence in the constitutions of countries is concerned, and the judgment of the Supreme Court of Kenya on the presidential election contributes immensely to the promotion and preservation of constitutionalism in the world. Given the perception regarding the non-existence of the rule of law in Africa, the judgement that set aside the election of a sitting president reinforces constitutionalism and the rule of law. The reaction of the sitting president of Kenya in respecting the court judgment and agreeing to re-run the election shows that the independent judiciary could play a pivotal role in preserving constitutionalism.

5. Judicial independence in South Africa

Judicial independence is enshrined in the constitution of South Africa. The judicial authority in the Republic is vested in the courts.[69] The courts are independent and subject only to the constitution and the law which they are required to apply impartially and without

[66] See *JH Mwau v Independent Electoral and Boundaries Commission* at para 410.
[67] See *JH Mwau v Independent Electoral and Boundaries Commission* at para 499.
[68] See Mutunga (2015) at 4.
[69] See section 165 (1) of the constitution of the Republic of South Africa, 1996.

fear, favour or prejudice.[70] No person or organ of state may interfere with the functioning of the courts, and organs of state are required to assist and protect the courts through legislative and other measures to ensure their independence, impartiality, dignity, accessibility and effectiveness.[71] This is a stronger position than that in Kenya in that in South Africa the constitution does not only guarantee judicial independence but also creates an obligation for organs of state to assist and protect judicial independence through legislative and other measures. The support for judicial independence is, therefore, not merely a norm, but a constitutional obligation that must be fulfilled by organs of state.

Judicial independence is strengthened by the prescription of the procedure for the appointment of judges and the establishment of an independent institution to facilitate the appointment and removal of judges from office. The constitution establishes the JSC which is the body responsible for the facilitation of the appointment of judges.[72] The JSC comprises of the Chief Justice who presides at the meetings of the JSC, the President of the Supreme Court of Appeal, one Judge President designated by the judges' president, the minister responsible for the administration of justice, two practicing advocates nominated from within the advocates' profession, two practicing attorneys nominated from within the attorneys' profession, one teacher of law designated by teachers of the law at South African universities, six persons designated by the National Assembly, four permanent delegates to the National Council of Provinces(NCOP) designated by the Council with a supporting vote of at least six provinces, and four persons designated by the president as the head of the national executive after consulting the leaders of all the parties in the National Assembly.[73] The Judge President and the premier of a province where the High Court concerned is located participate in the proceedings of the Commission when the Commission considers matters relating to any specific division of the High Court of South Africa.[74] The diverse composition of the JSC brings balanced views on the appointment of judges. It subjects the judicial appointees to severe scrutiny

[70] See section 165 (2) of the constitution.
[71] See section 165 (3) of the constitution.
[72] See section 178 (1) of the constitution.
[73] See section 178 (1) (a)- (J) of the constitution.
[74] See section 178 (1) (K) of the constitution.

and ought to prevent the shortlisting of unqualified and unsuitable candidates for judicial appointment.

The president, as the head of the executive, is responsible for the appointment of judges. The president appoints the Chief Justice and the Deputy Chief Justice after consulting the JSC and the leaders of the parties represented in the National Assembly, and he or she appoints the President and Deputy President of the Supreme Court of Appeal after consultation with the JSC.[75] The president appoints other judges of the Constitutional Court from the list of candidates prepared by the JSC after consulting with the Chief Justice and the leaders of the parties represented in the National Assembly.[76] The president appoints judges of all the other courts on the advice of the JSC.[77] The nature of the appointment of the Chief Justice, the Deputy Chief Justice and the President of the Supreme Court of Appeal does not augur well for the promotion of judicial independence. The untrammeled powers of the president with no prescribed qualification and guidelines for choosing candidates to the judicial positions may weaken the independence of the judiciary. Aspiring candidates may compromise their independence in favour of the president, knowing that the president has *carte blanche* power to nominate candidates to these positions.

Security of tenure for judges is also provided for in the constitution. The constitution prescribes the terms of office for the Constitutional Court judges and requires legislation to provide for the terms of office for judges of other courts. Judges of the Constitutional Court hold office for a non-renewable term of twelve years, or until they attain the age of 70, whichever occurs first, but the constitution gives Parliament the discretion to extend the term of office of a Constitutional Court judge.[78] The Judges' Remuneration and Conditions of Employment Act[79] further regulates the security of tenure for judges. With regard to the security of tenure for judges of the Constitutional Court, the Act restates the

[75] See section 178 (3) of the constitution.
[76] See section 174 (4) of the constitution.
[77] See section 174 (6) of the constitution.
[78] See section 176 (1) of the constitution.
[79] See Judge's Remuneration and Conditions of Employment Act 47 of 2001.

provisions of the constitution.[80] The Constitutional Court judges who, on attaining the age of 70 years, have not yet completed fifteen years of active service, must, however, continue to perform active service as Constitutional Court judges until the date by which they have completed a period of fifteen years of active service or have reached the age of 75 whichever occurs first.[81] Judges of other courts shall be discharged from active service as judges when they reach the age of 70 years if they have completed a period of service of not less than ten years.[82] Judges who, on reaching the age of 70 years, have not yet completed fifteen years of active service may continue to perform active service up to the date on which they complete a period of fifteen years or reach the age of 75 years, whichever occurs first.[83] Variation of retirement age of between 70 and 75 could be useful in retaining experienced judges to deal with backlogs of cases in the superior courts. Superior courts judges are overburdened owing to the shortage of judicial officers. As pointed out by the Chief Justice of South Africa in the 2018/ 2019 financial year given that the superior courts finalised only 75% of the reserve judgments,[84] retaining of experienced judges years could lessen the shortage of judges and improve performance in the superior courts.

Similarly, to the appointment of judges, the JSC plays a pivotal role in the removal of judges. Judges may be removed from office only if the JSC finds that they are suffering from incapacity, are grossly incompetent or are guilty of gross misconduct and if the National Assembly calls for the judges to be removed by a resolution adopted with a supporting vote of at least two thirds of its members.[85] Once the National Assembly has adopted the resolution calling for the removal of judges from office, the president must remove the judges.[86]

As stated above, the composition of the JSC is pivotal considering the powers bestowed on the JSC with regard to the appointment and removal of judges. The JSC ought to be

---

[80] See section 3 (1) of the Judge's Remuneration and Conditions of Employment Act.
[81] See section 4 of the Judge's Remuneration and Conditions of Employment Act.
[82] See section 3 (2) of the Judge's Remuneration and Conditions of Employment Act
[83] See section 4 of the Judge's Remuneration and Conditions of Employment Act.
[84] See the judiciary of the Republic of South Africa annual report (2018/2019) at 30.
[85] See section 177 (1) (a)- (b) of the constitution.
[86] See section 177 (2) of the constitution.

independent from the three branches of government. It is, however, worrying that, of the fifteen permanent members of the JSC, eight are appointed by the president, although representatives from the professions of advocates and attorneys are nominated by these bodies respectively.[87] In electing members to the JSC the legal professions do check on the power of the president because he or she can appoint only members that are elected by the professions themselves. The fact that the power to appoint finally rests with the president, however, places the president in a very strong position. The president's influence in the appointment of the JSC is further strengthened by the membership of the Minister of Justice who is a member of the president's cabinet. The minister is likely to carry a mandate from the president with regard to the activities of the JSC.

The process and procedure for the appointment of the Chief Justice, the Deputy Chief Justice, the President and the Deputy President of the Supreme Court of Appeal may, thus, not adequately promote the independence of the judiciary. The JSC and Parliament play a minimal role in the appointment of these judges since they are merely consulted, but the president has the freedom to choose a person of his or her choosing provided he or she consults with these institutions before making an appointment. This grey area in the appointment of these judges may negate, instead of promoting, judicial independence. Judges who still aspire for promotion to these positions may compromise their personal independence to appease the executive. Furthermore, the exercise of presidential power to nominate and appoint candidates of the president's own choosing is likely to expose the candidates to widespread criticism by opposition parties and other civil society groups. Since it is the duty of the opposition parties to check and monitor the exercise of power by government, including that of the president, the opposition is likely to be skeptical about the impartiality of a candidate that is chosen by the president for appointment to these senior positions in the judiciary. In a practical sense, the announcement of the nomination of the current Chief Justice, Mogoeng Mogoeng CJ, by former President Zuma elicited severe criticism from opposition parties in Parliament and

[87] See section 178 (1) (e) (f) of the constitution.

civil society organisations who questioned his suitability for the position.[88] Removing the power from the president to nominate, thus, and leaving him with the power to appoint these judges on the recommendation of the JSC only , would not only protect the candidates from criticism but would also strengthen the independence of the judiciary.

5. 1 Positive development on judicial preservation of constitutionalism

It was pointed out above that judges should not only be independent from outside influence but also from interference by other judges. Judges as human beings also find themselves at odds with the law or become involved as litigants in court before their colleagues. The rule of law and constitutionalism demand that an impartial judge be firm and apply the law without favour in those tempting situations where judges are called upon to decide against their own colleagues in the judiciary. In *Justice Alliance v President of the Republic of South Africa, Freedom Under Law v President of the Republic of South Africa, Centre for Applied Legal Studies v President of the Republic of South Africa*,[89] justices of the Constitutional Court had the opportunity to determine whether the extension by the executive of the term of office of their Chief Justice which had expired was congruent with the notion of judicial independence. Former President Zuma, relying on the then section 8 (a) of the Judges' Remuneration and Conditions of Employment Act which authorised the president to extend the term of office of a Chief Justice whose term of office had come to an end, [90] announced that he had decided to extend the period of office for Ngcobo CJ to remain in office for an additional period of five years. The validity of section 8 (a) of the Act and, subsequently, the extension of the term of office for the

---

[88] Kinama E "South Africa: Is the appointment of Justice Mogoeng Mogoeng as Chief Justice in the interest of the people?"(07-09-2011)*Institute of Security Studies* https://allafrica.com/stories/201109070582.html (accessed 25 November -2019).

[89] *Justice Alliance v President of the Republic of South Africa, Freedom Under Law v President of the Republic of South Africa, Centre for Applied Legal Studies v President of the Republic of South Africa*,2011 (5) SA 388 (CC).

[90] Section 8 (a) of the Judges' Remuneration and Conditions of Employment Act provided that a Chief Justice who becomes eligible for discharge from active service in terms of sections 3 (1) (a) or 4 (1) or (2) of the Act may at the request of the president, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the president, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.

Chief Justice was challenged before the court. The Constitutional Court held that the constitution vested Parliament only with the power to extend the term of office of a Constitutional Court judge and that the provisions of section 8 (a) of the Judges' Remuneration and Conditions of Employment Act amounted to an impermissible delegation of Parliament's legislative power to the president which was inconsistent with the provisions of the constitution relating to judicial independence.[91] Furthermore, it was held that section 8 (a) of the Act violated the principle of judicial independence by the granting of open-ended discretion to the president that could raise a reasonable perception that the independence of the judiciary might be undermined by the external interference of the executive.[92] Consequently, section 8 (a) of the Judges' Remuneration and Conditions of Employment Act was declared inconsistent with the constitution and invalid, and the consequent extension of the term of office of the Chief Justice was of no force and effect.[93]

This judgment demonstrates a fearless and bold attitude by judges of the Constitutional Court when deciding a case not only against the executive and legislature but also against their own leader - the Chief Justice. In preventing the president from extending the term of office of the Chief Justice contrary to the spirit of the constitution, the justices of the Constitutional Court demonstrated that they were independent even from influence among themselves.

Apart from pronouncing on judicial independence, the courts have given judgments on the violation of the constitution by the president and the failure of the legislature to oversee the exercise of power by the president. In the case of *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly (Economic Freedom Fighters v Speaker of the National Assembly 1)*,[94] members of the public, including a Member of Parliament, lodged complaints with the Public Protector concerning the security upgrades that were being effected at former

---

91 See *Justice Alliance V President of the Republic of South Africa* at para 69.
92 See *Justice Alliance V President of the Republic of South Africa* at para 68.
93 See *Justice Alliance V President of the Republic of South Africa* at para 116.
94 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

President Zuma's Nkandla private residence. The Public Protector investigated the matter and concluded that several improvements were non-security features and that any installation that had nothing to do with the president's security amounted to undue benefit or unlawful enrichment to him and his family.[95] In this regard, the Public Protector declared that the president had acted in breach of his constitutional obligations in terms of the constitution, and she took remedial action requiring the president to pay back a reasonable percentage of the cost of the non-security measures.[96] The Public Protector submitted her report requiring action to the president and the National Assembly. The National Assembly set up an *Ad Hoc* committee to examine the Public Protector's report and further nominated the Minister of Police to do further investigations based on the findings of the Public Protector. After considering the *Ad Hoc* committee's report and the report of the Minister of Police, which exonerated the president, Parliament resolved to absolve the president of all liability. Consequently, the president did not comply with the remedial action required by the Public Protector. Dissatisfied with the decision of the National Assembly, the Economic Freedom Fighters (EFF), joined by the Democratic Alliance (DA), two opposition parties in Parliament, launched a court application for an order directing the president to comply with the Public Protector's remedial action and declaring that both the president and the National Assembly had acted in breach of their constitutional obligations. The court found that, in disregarding the remedial action demanded of him by the Public Protector, the president had failed to uphold and defend the constitution as the supreme law of the land.[97] It was found that the conduct of the National Assembly, in passing a resolution purportedly nullifying the findings and remedial action taken by the Public Protector and replacing them with their own findings, had offended the rule of law, and it was another way of taking the law into their own hands.[98]

This judgment has vital significance with regard to the preservation of constitutionalism in that, firstly, the opposition parties introduced a motion of no confidence based on the Constitutional Court findings that the former president had violated the provisions of the

[95] See *Economic Freedom Fighters v Speaker of the National Assembly* 1 at para 6.
[96] See *Economic Freedom Fighters v Speaker of the National Assembly* 1 at para 10.
[97] See *Economic Freedom Fighters v Speaker of the National Assembly* 1 at para 83.
[98] See *Economic Freedom Fighters v Speaker of the National Assembly* 1 at para 95.

constitution against the president no less than three times.[99] Though the motions were defeated, the court judgment stimulated debate in Parliament to preserve constitutionalism by holding the president to account and checking the incidence of corruption as a sign for the entire nation. Secondly, arising from the court's judgement that ordered the president to pay back the tax payers' money that was used for non-security features, the president had to pay back to the nation the amount of R7.8million.[100] This judgment manifests the best judicial entrenchment of constitutionalism where the court pronounced on the limitation of the president's exercise of powers, and this resulted in the repayment to the nation of the money illegally used for the benefit of the president.

In the *Economic Freedom Fighters v Speaker of the National Assembly (Economic Freedom Fighters v Speaker of the National Assembly 2*),[101] following the failure by former President Zuma to comply fully with the Public Protector's remedial action in the *Economic Freedom Fighters* v *Speaker of the National Assembly* 1 judgment, the EFF instituted an application in the Constitutional Court seeking a declaratory relief including an order directing the president to comply with the remedial action, and a declaration to the effect that the National Assembly too had breached a constitutional obligation in that it had failed to hold the president accountable through section 89 (1) of the constitution that is known as the impeachment process.[102] The majority judgement of the court held that the process for removing the president from office must be preceded by a preliminary enquiry during which the National Assembly would determine that a listed ground existed.[103] Furthermore, the court found that section 89(1) of the constitution implicitly imposes an obligation on the National Assembly to make rules especially tailored for an impeachment process and that the National Assembly had, in breach of section 89(1) of the

---

[99] Gaffey C " South Africa: What's the point of no confidence motion against President Jacob Zuma? (11-11-2016) *World* www.newsweek.com/south-africa-whats-point-no-confidence-motions-against-president-jacob-zuma-520270 (accessed 1 October 20119).

[100] Whittles G " Zuma pays back the money-but where did he get the R7.8 million?" (12-09-2016) *Mail & Guardian* 12/09/ https:// mg.co.za/article/2016-09-12-zuma-pays-back-the-money-but-where-did-he-get-the-r78million > (accessed 1 October- 2019).

[101] *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 CC.

[102] Section 89 (1) of the constitution authorises the National Assembly by resolution adopted with a supporting vote of at least two thirds of its members to remove the president from office on the grounds of a serious violation of the constitution or law.

[103] See *Economic Freedom Fighters* v Speaker of the National Assembly 2 at para 180-182.

constitution, failed to make rules regulating the impeachment process.[104] It was held that, by failing to determine whether the president had breached section 89 (1) of the constitution, the National Assembly had failed to hold the president to account following delivery of *Economic Freedom Fighters v Speaker of the National Assembly* 1 judgement where it was found that the president had violated the constitution by failing to comply with the remedial action required by the Public Protector.[105] The court, thus, ordered the National Assembly to make rules regulating the impeachment procedure.[106]

The significance of this judgment with regard to the preservation of constitutionalism is manifested both in the bold findings by the court that Parliament had failed to hold the president accountable and, in its order, requiring Parliament to adopt rules for the procedure regulating a motion for the removal of the president under an impeachment process. Arguably *the Economic Freedom Fighters* v *Speaker of the National Assembly* 1 and 2 judgments paved a way for the forced resignation of President Zuma from office. The pronouncement by the Constitutional Court that the president had failed to uphold the constitution bolstered the opposition parties in their numerous motions of vote of no confidence against the president because they referred to the court judgment that the president had failed to uphold the constitution of the Republic. As was reported in the media, President Zuma was forced to resign after his political party, the African National Congress (ANC), had publicly announced that it would support the motion of no confidence instituted by opposition parties against him in Parliament.[107]

6. Conclusion

Guaranteeing judicial independence in a constitution is a necessary positive step towards promoting the independence of the judiciary which is essential for the preservation of constitutionalism. The protection of the notion of judicial independence should be

---

104 See *Economic Freedom Fighters* v Speaker of the National Assembly 2 at para 196.

105 See *Economic Freedom Fighters* v *Speaker of the National Assembly 2* at para 208.

106 See *Economic Freedom Fighters* v *Speaker of the National Assembly* 2 at para 222.

107 J Burke " Jacob Zuma Resigns as South Africa's President on Eve of no Confidence Vote" (14-02-2018) *The Guardian* < www.the guardian.com/world2018/feb/14/Jacob-zuma-resigns-south-africa-president > (accessed 01-10- 2018).

reinforced by the political will to abide by and respect courts' decisions by the government of the day as well as the determination by the judiciary to be bound by the oath of office taken by judges and the exercise of judicial authority with integrity. The guaranteeing of judicial independence in the Kenyan and South African constitutions may not be a perfect safety net, but it does provide a safeguard to protect the judiciary from unwarranted threats and interference from the other branches of government. The recent judgments by the Kenyan and South African courts can be attributed to the protection of judicial independence in the constitutions of these countries. The fearlessness and unwavering stance taken by the courts in exercising their judicial authority is manifest in the trails where judgments have been given against the IEBC, executive and the legislature.

Though the legislature and executive have flouted the constitution, they should, nevertheless, be hailed for generally respecting and abiding by the courts' decisions. In this regard the conduct of the legislature and the executive strengthens the independence of the judiciary and, ultimately, promotes constitutionalism. Both the Kenyan and South African democracies can learn from each other, and other modern democracies in the world can learn further from the Kenyan and South African jurisdictions about the preservation of judicial independence and the promotion of constitutionalism. Given the weaknesses with regard to the appointment of the head of the judiciary and President of the Supreme Court of Appeal, South Africa can learn from Kenya and entrust the JSC with the authority to elect and recommend these judicial officers to the president for appointment. Reducing the dominance of the president in appointing judicial officers and the majority of members of the JSC would minimise the risk of the seeking of favours by the judges from the executive and hoping to receive favours through presidential appointment, and it would further strengthen the independence of the judiciary. With regard to the review of actions of the president and Parliament, the Kenyan judiciary can also learn from the South African judiciary which has a history of fearlessly deciding against the government. If Africa respected court judgments and preserved constitutionalism, the perception about Africa's being a dark continent that flagrantly flouts the rule of law, constitutionalism and principles of democracy would change. Though the stance taken by the Kenyan and South African courts on the preservation of constitutionalism cannot be fully celebrated owing to some of the challenges identified in

this article, it has shown a positive development that could provide a model for other African countries in sustaining constitutionalism.

Bibliography

Books

Greenberg D, Katz SM, Oliviero MB & Wheatley S(eds) Constitutionalism and democracy: Transitions in *the contemporary World* Oxford: Oxford University Press (1993).

De Vos P & Freedman W (eds) *South African constitutional law in context* South Africa: Oxford University Press (2010).

Chapters in books

Dobner P "More law, less democracy? Democracy and transitional constitutionalism" in Dobner P& Loughlin M (eds) *The twilight of constitutionalism* Oxford: Oxford University Press (2010) 143.

Kibara G " The State of Constitutionalism in Kenya 2003" Tusasirwe B (ed) *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2003* Kampala: Fountain Publishers (2003) 89.

Okoth-Ogendo HWO "Constitutions without constitutionalism: A reflections on an African political paradox" in D Greenberg, SN Kartz, B Oliviero & Wheatly S (eds) *Constitutionalism and Democracy: Transition in the Contemporary World* Oxford: Oxford University Press (1993) 67.

Ramcharan BG " Constitutionalism in an age of globalisation and global threats" in Frishman M & Muller S (eds) *The dynamics of constitutionalism in the age of globalisation* The Netherlands: Hague Academic Press (2008) 20.

Journal articles

Barber A " Constitutionalism in exile: Is the constitution a charter of negative liberties or a charter of positive benefits?: Fallacies of negative constitutionalism (2006) 75 *Fordham Law Review* 651 -667.

Bendor AL " The relevance of the judicial activism vs. judicial restraint" (2011) 47 *TULSA Law Review* 331 – 337.

Epstein RA " Why we need term limits for congress: Four senate, ten in the house" (2010) 78 *Tennesse Law Review* 849-957.

Gilbert MD " The law and economics of entrenchment" (2019) 54 *Georgia Law Review* 1 -50.

Gerstenberg O " Negetive/Positive constitutionalism, 'fair balance,' and the problem of justiciability" (2012) 10 *International Journal of Constitutional Law* 904 927 .

Hostetler JN and Washburne TW " The constitution's final intepreter: We the people (1997) 13 *Regent University Law Review* 13-56.

Moliterno JE " The administrative judiciary's independence myth" (2006) *Journal of the national Association of administrative Law Judiciary* 55- 97.

Mr Justice Gicheru JE "Independence of the judiciary: Accountability and contempt of court (2007) 1 *Kenya Law Review* 1 -17.

Mutunga W "The 2010 constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions" (2015) 1 *Speculum Juris* 1 -20.

Ojwang B "The independence of the judiciary in Kenya" (2008-2010) 2 *Kenya Law Review* 1-11 .

Olasunkanmi A "Constitutionalism and the challenge of development in Africa" (2014) 5 *International Journal of Politics and Governance* 1-17.

Pfeifer S B" The role of the judiciary in the constitutional systems of East Africa (1978) 16 *The Journal of Modern African Studies* 33-66.

Posner EA and Vermeule A " Legislative entrenchment: A eeappraisal" (111) 2002 *Yale Law Journal* 1665-170.

Rosenfeld M "The rule of law and the legitimacy of constitutional democracy " (2001) 74 *Southern California Law Review* 1307-1351.

Siyo L and Mubangazi JC " The Independence of South African Judges: A Constitutional and Legislative Perspective (2015) 18 *PER* 817 818.

Legislation

Constitution of the Republic of Kenya, 1963.

Constitution of Kenya Amendment Act of 2008.

Constitution of Kenya of 2010 National Assembly Election (Cap 7).

Constitution of Kenya Amendment Act 6 of 1992.

Rules the National Assembly Elections (Cap7), 1993.

(Kenya) Elections Act 24 of 2011.

Constitution of the Republic of South Africa, 1996.

Judge's Remuneration and Conditions of Employment Act 47 of 2001.

Case law

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly[1] 2016 (3) SA 580 (CC).

Economic Freedom Fighters v Speaker of the National Assembly 2018 (2) SA 571 CC.

Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC).

Justice Alliance v President of the Republic of South Africa, Freedom under Law v President of the Republic of South Africa, Centre for Applied Legal Studies v President of the Republic of South Africa 2011 (5) SA 388 (CC).

J H Mwau v Independent Electoral and Boundaries Commission and 2 Others [2017] eKLR.

Moi v Matiba and 2 others (2008) 1 KLR.

Mwai Kibaki v Daniel Moi [1999] eKLR.

Orengo v Moi and 12 Others [2008] 1 KLR .

Rail Amolo Odinga v Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR.

President of the Republic of South Africa v South African Rugby Football Union 1999 (7)BCLR 725.

Presidential Petition 1 of 2017.

S v Van Rooyen (General Council of the Bar of South Africa Intervening) 2002 (8) BCLR 810.

Reports

Judiciary of the Republic of South Africa Annual Report (2018/2019) 30.

Sieff K " Kenya election re-run marred by clashes and low turnout at the polls" *The Washington Post* (26- 10- 2017).

Internet sources

Burke J " Jacob Zuma resigns as South Africa's president on eve of no confidence vote" (14-02-2018) *The Guardian* www.the guardian.com/world2018/feb/14/Jacob-zuma-resigns-south-africa-president (accessed 1 October 2019).

Gaffey C“ South Africa: What’s the point of no confidence motion against President Jacob Zuma? (11-11-2016) *World* www.newsweek.com/south-africa-whats-point-no-confidence-motions-against-president-jacob-zuma-520270 (accessed 1 October 2019).

Kinama E “South Africa: Is the appointment of Justice Mogoeng Mogoeng as Chief Justice in the interest of the people?” (7-09-2011) *Institute of Security Studies* https://allafrica.com/stories/201109070582.html (accessed 25 November 2019).

Walusansa W “ Emulate Kenya judicial independence” (8-09-2017) *Daily Monitor* https:// www.monitor.co.ug/OpEd/Letters?Emulate-Kenya-judicial-independence/8060313 (accessed 13 September 2019).

Whittles G “ Zuma pays back the money-but where did he get the R7.8 million?” (12-09-2016) *Mail & Guardian* 12/09/ https:// mg.co.za/article/2016-09-12-zuma-pays-back-the-money-but-where-did-he-get-the-r78million > (accessed 1 October 2019).

Theses

Oseko JO “Judicial independence in Kenya: Constitutional challenges and opportunities for reform” (unpublished D Phil thesis Leicester University , United Kingdom 2011).